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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

14 Scott Huminski,

15 Plaintiff,

16 v.

17 Maricopa, County of, Maricopa
18 County Attorney's Office, William
19 Montgomery, Mark Faull, Gilbert,
20 Town of, John Lewis, Patrick Banger,
21 Tim Dorn, David Meyer, and Debra
22 Hartin,

23 Defendants.

CASE NO. CV11-02352-PHX-JAT

DEFENDANT TIM DORN'S REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION
TO DISMISS

(Assigned to The Honorable James A.
Teilborg)

22 Plaintiff's response to Defendant's motion to dismiss fails to demonstrate that
23 he has asserted any legally-cognizable claims against Defendant Town of Gilbert Police Chief
24 Tim Dorn ("Chief Dorn") or that this Court has subject matter jurisdiction over the claims
25

1 asserted. Accordingly, Chief Dorn renews his request that this Court, pursuant to Fed. R. Civ.
 2 P. 12(b)(1) and 12(b)(6), dismiss Plaintiff's Amended Verified Complaint¹ ("Complaint").

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 **I. CHIEF DORN'S MOTION TO DISMISS WAS NOT FILED "VEXATIONOUSLY."**

5 In his Opposition to Chief Dorn's Motion to Dismiss ("Opposition"), Plaintiff
 6 ("Huminski") contends that Chief Dorn has filed "[m]ultiple requests for completely different
 7 relief" which "burden the Court and Plaintiff." (Dkt. # 17.) Chief Dorn timely filed his
 8 motion to dismiss because this Court has not ruled on his motion for stay, not to burden this
 9 Court or Huminski. Moreover, the Motion to Dismiss is supported by numerous citations to
 10 the law and points out numerous deficiencies in the Complaint that warrant its dismissal.
 11

12 **II. HUMINSKI'S REPLY ADDRESSES NONE OF THE ARGUMENTS IN CHIEF DORN'S** 13 **MOTION TO DISMISS, THUS THE MOTION TO DISMISS SHOULD BE GRANTED.**

14 Huminski has the burden of proving the existence of subject matter jurisdiction
 15 and he clearly has not met that burden. *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095,
 16 1102 n.1 (9th Cir. 2007) ("Once challenged, the party asserting subject matter jurisdiction has
 17 the burden of proving its existence.") (citing *Trentacosta v. Frontier Pac. Aircraft Indus.,*
 18 *Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). Rather, Huminski's Opposition merely: (1) deems
 19 the motion to dismiss "vexatious[]"; and (2) states that Huminski plans to file numerous
 20 additional amendments to this lawsuit. (Dkt. # 17.)
 21
 22

23
 24 ¹ Though he was never served with the amendments (Dkt. # 9 and 10) to Plaintiff's Amended
 25 Complaint (Dkt. # 5), Defendant Dorn's Motion to Dismiss responded to the Complaint as
 amended. Defendant Dorn is unaware of any further amendments to the Amended Complaint.

Huminski's Opposition does not respond to Chief Dorn's arguments that this Court lacks subject matter jurisdiction, that Huminski's Amended Complaint fails to state a claim upon which relief can be granted, or that this Court should alternatively require a more definite statement on Counts Three, Four, and Five. (*Id.*) In effect, it is as if Huminski has not filed a response at all. Chief Dorn therefore requests that this Court grant his motion to dismiss Huminski's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See Frank v. Wells Fargo Bank Nat. Ass'n*, 2011 WL 1480041, *1 (D. Ariz. April 19, 2011) ("Failure to respond alone is grounds for the Court to grant Defendants' motion to dismiss. The Court finds Plaintiff's failure to respond to Defendants' motions constitutes acquiescence to the motions being granted.") (internal citations omitted); *cf. Walsh v. Countrywide Home Loans, Inc.*, 435 Fed.Appx. 607, 608-09 (9th Cir. 2011) (noting that where original response to motions to dismiss "did not directly address any of the arguments advanced in the motions," court "could have dismissed under Federal Rule of Civil Procedure 41(b) at that time.").

Huminski's statements that he plans to file numerous amendments to the Complaint and that he has allegedly filed Notices of Claims with the Town of Gilbert have no bearing on the Complaint's substantive deficiencies. As described in Chief Dorn's Motion to Dismiss, this Court lacks subject matter jurisdiction over Huminski's claims and Huminski's Complaint fails to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12(b)(1) and (b)(6)*.

1 **III. CONCLUSION.**

2 Huminski has failed to carry his burden of showing that this Court has subject
3 matter jurisdiction and his Complaint does not state any claim upon which relief can be
4 granted. Chief Dorn therefore respectfully requests that this Court dismiss the Complaint and
5 assess Chief Dorn's attorneys' fees and costs against Huminski. *See* 42 U.S.C. § 1988;
6 *Hensley v. Eckerhart*, 461 U.S. 424, 420 n. 2 (1983) (prevailing defendant may recover
7 attorney's fees where suit was frivolous, unreasonable, or without foundation, even though
8 not brought in subjective bad faith).
9

10 Alternatively, should the Court determine that dismissal is inappropriate, Chief
11 Dorn reiterates his request that this Court require a more definite statement on Counts Three,
12 Four, and Five.
13

14 RESPECTFULLY SUBMITTED this 15th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2012, I electronically transmitted the attached Reply to Plaintiff's Opposition to Motion to Dismiss to the Clerk's Office of the United States District Court for the District of Arizona, using the CM/ECF System for filing and a copy was sent by U.S. First Class Mail to the following whose registration status is unknown:

Scott Huminski
2624 S. Bahama Drive
Gilbert, AZ 85295
Plaintiff

s/Cindy Barton